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No. 84-1246

IN THE

Supreme Court of the United States

October Term, 1984

ERIC DAHLBERG,

Petitioner,

v.

CARL F. BECKER and GOVERN, McDOWELL & BECKER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Questions Presented For Review.

Petitioner's brief misstates the nature of the legal issue, or issues, sought to be reviewed. The issue is whether the Court of Appeals, in affirming the decision of the District Court, erred in holding that petitioner failed to state a cause of action because there was no demonstration either of state action or a state actor.

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Statement of the Case.

As petitioner's brief notes, this is a civil action for damages founded on 42 USC 1983 and the Fourth and Fourteenth Amendments. Federal jurisdiction is conferred by 28 USC 1331 and 1343.

The complaint was dismissed on its face for failure to state a claim.

Underlying the complaint herein was an action in New York State Supreme Court by petitioner, Eric Dahlberg, against Ellen Dahlberg, the client of respondent attorney, Carl Becker, a member of respondent law firm, Govern, McDowell & Becker, for divorce. Ellen Dahlberg counterclaimed for her own divorce and after negotiations, a stipulation was entered into between the parties on March 12, 1982 and a judgement of divorce, in favor, of Ellen Dahlberg, was signed on June 30, 1982 apparently adopting the terms of the stipulation. Some months subsequent to the entry of the judgment of divorce, the respondent attorneys prepared an order to show cause why petitioner, Eric Dahlberg, should not be punished for contempt for failing to make certain payments required by the divorce decree, and for failing to execute certain documents. Petitioner, Eric Dahlberg, never appeared on the return date of the order to show cause. Accordingly, some months later, when the petitioner still had not purged the contempt, the respondent attorneys prepared and obtained a commitment order, signed by a judge, providing for petitioner's arrest until certain attorneys' and maintenance fees were paid and a promissory note in favor of his former wife, Ellen, was executed. Sometime subsequent thereto the sheriff arrested petitioner and took him before a county judge. Petitioner Dahlberg's friends then produced the necessary funds, promissory notes, and financing statements. However, the county court judge refused to order plaintiff's release, absent authorization, either from a state Supreme Court justice or respondent attorneys. Petitioner therefore was confined overnight in jail until such time as the respondent attorneys contacted the county court judge and authorized petitioner's release contingent on his signing the requisite documents and pay-

ing the maintenance and attorneys fees. Subsequent thereto petitioner executed the documents, turned over the fees, and was released by the county court judge from jail.

Petitioner sued the attorneys, their client, Ellen Dahlberg, and the sheriff.

As petitioner's brief notes, the District Court dismissed the complaint as to the respondent attorneys and their client for failure to state a claim under 42 USC 1983 in that the complaint failed to allege that they had acted under color of state law. The action against the sheriff was later dismissed by stipulation and order.

Petitioner appealed as to the respondent attorneys only. The Court of Appeals for the Second Circuit affirmed on the ground that there was no demonstration either of state action or a state actor.

Summary of Argument.

As the Court of Appeals correctly held, in affirming the decision of the District Court below, this is a case in which we are presented neither with state action nor state actor. Furthermore, for this court to adopt the position as taken in petitioner's brief, would result in a finding of state action or "color of law" in *every* situation in which a private party invokes state legal procedures, contrary to this court's holding in *Lugar v. Edmondson Oil Co.*, 457 US 922 (1982) and its predecessors.

Argument.

Petitioner's brief, in support of his petition for writ of certiorari, seeks to both abrogate the decision of this court

in *Lugar v. Edmonston Oil Co.*, 457 US 922 (1982), and to expand upon all prior rulings of this court, to establish a new rule whereby any use of a state's judicial system by a private party would be considered to be state action.

A. State responsibility.

Petitioner's complaint does not allege that New York State contempt procedures are unconstitutional, rather petitioner's complaint alleges that the respondent attorneys misused the existing state procedures. Such a complaint clearly falls within "Count II" of *Lugar v. Edmonston Oil Co.*, 457 US 922 (1982), wherein it was held that "private misuse of a state statute does not describe conduct that can be attributed to the state" (457 US 922, 941). In applying the *Lugar* rationale to the case at hand, the Court of Appeals correctly found that:

> The deprivation of Dahlberg's federally-protected rights is not "caused" by the exercise of some right created by the State in the same sense as was Lugar's. A private party's misuse of New York's Judiciary Law that causes plaintiff to be imprisoned overnight is not fairly attributable to New York State.

(Petitioner's App. 10)

Likewise, petitioner's complaint fails to allege any joint action between the private attorneys and the judge or any other state official sufficient to convert the action of the private attorneys to state action or responsibility. As was noted in a footnote to the decision in *Lugar v. Edmonston Oil Co.*, the Supreme Court did "not hold today that a private party's mere invocation of state legal procedures constitutes 'joint participation' or 'conspiracy' with state

officials satisfying the Section 1983 requirement of action under color of law" (457 US 922, 939).

The decision of the Court of Appeals with regard to state action is consistent with the recent holdings of this court in *Blum v. Yaretsky,* 457 US 991, and *Rendell-Baker v. Kohn,* 457 US 830.

B. State actor.

It is the position of the respondents that not only is there no state action in the case at hand, but additionally, as the Court of Appeals correctly held, the respondents are not state actors. As noted previously, there is not sufficient link between the private attorney respondents and any state agent sufficient to transform the respondents into state actors. Respondents would urge that the decision of the Court of Appeals on the issue of state actor is in accord with the holding of the Supreme Court in *Lugar v. Edmondston Oil Co.,* 457 US 922, 940 (*see Rendell-Baker v. Kohn,* 457 US 830, 842, and *Polk County v. Dodson,* 454 US 312, 318).

CONCLUSION.

For the reasons stated above, respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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